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In The
Supreme Court of the United States

EDDIE BERNARD ROGERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES A FEDERAL COURT HAVE DISCRETION, UNDER *SPEARS v. UNITED STATES* AND *KIMBROUGH v. UNITED STATES*, TO DISAGREE WITH GUIDELINE POLICY AND DETERMINE RELEVANT CONDUCT FOR SENTENCING BASED SOLELY ON A DRUG QUANTITY FOUND BY THE JURY?

II. MAY A FEDERAL COURT IMPOSE ON A DEFENDANT A SENTENCE IN EXCESS OF THE MAXIMUM BASED ON DRUG AMOUNTS FOR WHICH THE JURY SPECIFICALLY ACQUITTED HIM WITHOUT VIOLATING OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TRIAL BY JURY?

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term 2010

EDDIE BERNARD ROGERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit

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Petitioner, Eddie Bernard Rogers, asks this Court to issue a writ of certiorari to review two important issues: (1) the district court's failure to recognize its discretion to categorically disagree with and vary from a congressional or guideline policy of rejecting a jury's specific finding of drug quantity for sentencing purposes, contrary to *Spears v. United States*, 555 U.S. 261, ___, 129 S. Ct. 840, 843-44 (2009) (*per curiam*), and *Kimbrough v. United States*, 552 U.S. 85, 89 (2007); *see Vasquez v. United States*, 130 S. Ct. 1135 (2010) (vacating and remanding to permit consideration of Solicitor General's

concession that district court has discretion to vary from career offender guideline), and (2) the continued validity of a district court finding drug quantity based on amounts for which a defendant was specifically acquitted by the jury. Both issues are worthy of review.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *United States v. Rogers*, 2010 WL 5135249 (4th Cir. 2010), is reproduced in the Appendix. [1a-13a]

JURISDICTION

The opinion of the Fourth Circuit was entered on 17 December 2010. [1a] A timely filed petition for rehearing and suggestion for rehearing en banc was denied on 19 January 2011. [28a-29a] Petitioner presented both of the issues raised herein to the circuit and district courts, which rejected them on the merits. [30a-31a] These important issues justify review by this Court, whose jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

U.S. Const. Amend. V: "No personal shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

U.S. Const. Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

STATEMENT OF THE CASE

A. Procedural History

A grand jury indicted petitioner for conspiring to distribute more than 50 grams of cocaine base, distributing 32 grams of cocaine base on 1 March 2005, distributing 63.5 grams of cocaine base on 4 March 2005, and maintaining a residence for the purpose of distributing cocaine base. [34a-37a] The jury convicted him of conspiring to distribute 13.4 grams of cocaine base and maintaining a residence for the purpose of distributing cocaine base. [32a-33a] The jury acquitted him of distributing 32 grams of cocaine base on May 1and distributing 63.5 grams of cocaine on May 4. [32a-33a] At sentencing, the district court refused to consider limiting the drug quantity to the amount specifically found by the jury, erroneously believing it did not have the authority to do so. [30a-31a] The district court held petitioner responsible for 125.8 gram of cocaine base, 112.4 grams of which the jury had acquitted him. Using this calculation the district court established an advisory guideline range of 235 to 293 months. After rejecting a request to give full consideration to the unfair disparity between the treatment of powder cocaine as opposed to cocaine base in the guidelines, the district court imposed a sentence of 284 months, a five-year term of supervised release, and a special assessment of $200.00. [16a-27a]

On appeal, petitioner challenged the district court's erroneous belief that is lacked discretion to disagree with the guidelines and determine relevant conduct based on the drug quantity specifically found by the jury. He also argued the district court

should not have relied on conduct for which the jury specifically acquitted him in fashioning its sentence. The United States Court of Appeals for the Fourth Circuit affirmed. [1a-15a] It then denied a petition for rehearing and suggestion for rehearing en banc on 19 January 2011. [28a]

B. Trial Evidence

In 2002, the North Carolina State Bureau of Investigation and the Scotland County Sheriff's Department began investigating a possible cocaine conspiracy in Laurinburg, North Carolina, targeting petitioner, Melanie Rogers (his wife), Darryl Law, and Tracy Bethea. They coordinated numerous undercover, controlled purchases of cocaine base. All the lay witnesses who testified had questionable credibility as reflected by the jury's acquittal of petitioner on both of the substantive charges.[1]

Curtis Ealy said he sold drugs from the Rogers' house. An undercover officer purchased 0.3 grams of cocaine base from Ealy on 8 May 2003. The officer later returned the same day and purchased an additional 0.2 grams of cocaine base from Ealy. The officer purchased 0.1 grams of cocaine base from Ealy on May 19 in the same way. Ealy claimed he sold cocaine at the direction of petitioner, boasting

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[1] The jury convicted petitioner of conspiring to distribute cocaine based and fixed the amount of drugs at 13.4 grams. However, the jury acquitted him of distributing 32 grams of cocaine base on 1 March 2005 and distributing 63.5 grams of cocaine base on 4 March 2005. [32a-33a] These verdicts strongly suggested the jury discredited the testimony of various witnesses who had received or were expecting to receive sentencing concessions from the government or were otherwise lacking in credibility.

that he sold cocaine supplied by him Rogers "every day' for seven years.

Ealy admitted being addicted to cocaine and smoking "crack" every day during that time. The "crack" affected his ability to sleep and remember events. Similarly, Michael Miller testified he bought drugs but was unable to recall a single detail of the sales other than he drove to the house and asked for a $20 rock. Preston McPhatter testified he received at least 9 ounces (255.15 grams) of cocaine base from petitioner during 2002. He saw him with handguns, either on his person or at his residence.

Angela Evans sold cocaine for petitioner at his residence and claimed she got it from either him or Melanie Rogers. She admitted being a cocaine addict and stayed with the Rogers "because I was so far in my addition, I couldn't see." Evans even bought some cocaine in front of an undercover officer. Yet Evans own testimony established her character for untruthfulness. She shoplifted and stole cocaine from the Rogers and went to prison in 2004 and 2005 for forging and uttering Melanie Rogers' checks. Even Evans' mother, Diane Grooms, believed her daughter was a compulsive liar.

After she learned of an indictment against her, Evans agreed to participate in undercover work for law enforcement "[b]ecause at that, I wasn't going back to do no more prison time. I'm tired of doing prison time." In addition to hoping her participation would lead to a lighter sentence, Evans was paid for her participation. Nolie McLaurin, another paid informant, claimed she bought cocaine from the Rogers. Nolie McLaurin went to the

Rogers' residence to buy drugs on 24 October 2006. She said petitioner was on his porch when she arrived and asked if she was setting him up when she asked about the drugs. He pointed to McLaurin to the end of a dead end road, where she met Bethea. She told Bethea what she wanted, and he went into the house. Bethea returned and sold her 1.4 grams of cocaine base. McLaurin returned on October 27 and bought 0.8 grams of cocaine base from petitioner and Bethea. McLaurin returned again on October 31 and bought 0.7 grams of cocaine base from Bethea.

Dale Blackhorse testified he contacted Tracy Bethea on 1 March 2005 to buy cocaine base from petitioner. Blackhorse received a return telephone call from Bethea who indicated petitioner would send his "right-hand man" to conduct the transaction. Blackhorse went to Bethea's residence and was introduced to Darryl Law. Blackhorse paid $1,600 for 32 grams of cocaine base. Blackhorse told Bethea the drugs were short. Law conducted a second transaction with Blackhorse to make up for this shortage. The informant purchased 63.5 grams of cocaine base on March 4. The jury acquitted petitioner of any involvement in this transaction. [32a-33a]

An undercover officer went to the Rogers' residence on 12 September 2005 and purchased 0.5 grams of cocaine base from Bethea. An undercover officer went to the residence on 3 October 2005, and purchased 0.3 grams of cocaine base from Bethea. When the undercover came back a second time on October 3, Melanie Rogers was in the front yard of the residence and yelled for Bethea. Bethea came from the side yard of the residence and met with the

undercover officer, but declined to make a sale because he saw law enforcement officers in an unmarked police car nearby.

Law enforcement officers searched the Rogers' house on 6 October 2005 and 2 November 2006. On October 6, twelve officers and drug sniffing dogs scoured the house and the grounds. On November 2, five officers searched the grounds. Despite two in-depth searches, police found no cocaine or cocaine residue in the house. There was also no indication that cocaine had been cooked into "crack."

Petitioner testified he did not store or cook cocaine in the home. The lack of evidence discovered by law enforcement in the two searches of his house corroborated this testimony. The only cocaine discovered during the two searches was four grams found in Michael Bethea's pocket during the October 6 search. Bethea was outside the house at the time the police seized the drugs. In addition, a pipe containing cocaine residue was found in one of the outbuildings behind the residence. Although controlled buys from petitioner were supposedly made several days before the search, none of the money used to make the drug purchases matched any of the money found.

C. Sentencing Evidence

Michael Bethea testified at the sentencing hearing. He claimed he sold drugs for petitioner from 2002 through 2006. He claimed sold drugs for him "every day" from "morning to night" during these four years. However, petitioner had a rim

business in McCall, which was about fifteen minutes from his house, that he ran during this time.

Preston McPhatter (Stubbs) also testified at the sentencing hearing. He admitted he was cooperating with the government and used drugs. He claimed he "got about nine, 10 ounces, all equal together" from petitioner.

MANNER IN WHICH THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner asked the district court to exercise its discretion and determine the relevant conduct based on the jury's specific finding of the quantity of drugs involved in the conspiracy. The district court flatly refused, stating it did not have the authority "even permissively" to do so. [30a] As the district court starkly said, "We're not going by what the jury came up with, that's what I just said." [31a] Petitioner then raised the issue on appeal, both in terms of (1) the district court failing to realize it had the discretion to vary from the guidelines based on a disagreement with the policy of including acquitted conduct in the determination of relevant conduct to set the advisory guideline range and (2) the impropriety of using acquitted conduct at sentencing. The Fourth Circuit rejected these claims on the merits. [6a-8a, 9a] Both claims have been fully litigated, were decided on the merits below, and are properly presented to this Court.

REASONS WHY A WRIT OF CERTIORARI SHOULD ISSUE

I. A FEDERAL COURT HAS DISCRETION, UNDER *SPEARS v. UNITED STATES* AND *KIMBROUGH v. UNITED STATES*, TO DISAGREE WITH GUIDELINE POLICY AND DETERMINE RELEVANT CONDUCT FOR SENTENCING BASED SOLELY ON THE SPECIFIC DRUG QUANTITY FOUND BY THE JURY.

After *Spears v. United States* and *Kimbrough v. United States*, a district court has unfettered discretion to disagree with a policy underlying the guidelines and impose a sentence accordingly. *See United States v. Corner*, 598 F.3d 411, 415 (7th Cir. 2010) (en banc) (sentencing courts "are at liberty to reject *any* Guideline on policy grounds"). However, as evidenced by the decision below, a division exists among the circuits as to the applicability of this discretion beyond the context of the 100:1 crack/powder disparity that was at issue in *Spears* and *Kimbrough*. *Compare United States v. Bailey*, 622 F.3d 1 at *10-11 (D.C. Cir. 2010) (reversing judgment where district court felt compelled to follow career offender guideline); *United States v. Merced*, 603 F.3d 203, 218-19 (3d Cir. 2010) (assuming district court may vary from career offender guideline); *United States v. Camacho-Arellamo*, 614 F.3d 244, 248-19 (6th Cir. 2010) (district court may disagree with "fast-track" disparity in immigration cases); *United States v. Barron*, 557 F.3d 866, 871 (8th Cir. 2009) (assuming district court may disregard mandatory enhancement for weapon capable of using large

volume magazines under U.S.S.G. § 2K2.1(a)(4)(B) on policy grounds), *with United States v. Ringgold*, 571 F.3d 948, 951-52 (9th Cir. 2009) (district court not allowed to consider disparity between sentence defendant would receive in state as opposed to federal court for same crime); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2008) (district court may not vary based on policy disagreement with "fast-track" analysis); *United States v. Gomez-Herrera*, 523 F.3d 554, 563 (5th Cir. 2008) (same).

Here the district court categorically stated it had no discretion to impose a sentence based solely on the drug quantity found by the jury [30a, 31a], and the Fourth Circuit affirmed. In its opinion, the Fourth Circuit took an unacceptably restrictive reading of *Spears* and *Kimbrough* in finding they did not provide a district court with the discretionary authority to rely on a specific drug quantity found by the jury. [8a] But this Court's recent remand, based on the Solicitor General's concession that district courts have discretion to disagree with the career offender guideline, *see Vasquez v. United States*, 130 S. Ct. 1135 (2010) (granting certiorari, vacating, and remanding), demonstrates the court below erred. Certiorari should be granted to resolve the division among the circuits on the extent of a district court's discretion to disagree with guideline policy after *Spears* and *Kimbrough*. Alternatively, this Court should vacate the judgment and remand as it did in *Vasquez*.

Petitioner was charged with conspiring to distribute more than 50 grams of cocaine base, along with two substantive counts of distribution and one

count of maintaining a dwelling to distribute drugs. [34a-37a] The jury acquitted him of both substantive charges, but convicted him of conspiracy and maintaining a dwelling. [32a-33a] With regard to the conspiracy conviction, the jury specifically found him responsible for 13.4 grams of cocaine base. [32a]

At sentencing, petitioner urged the district court to use only the amount of cocaine base found by the jury beyond a reasonable doubt in calculating the advisory guidelines. "[O]ur position is, the logical extension of all language that's been in Blakely and Apprendi and all of these cases that have gotten us to where we are now, where a jury has to decide drug amounts, is that when the jury hears that and decides beyond a reasonable doubt in their collective wisdom what a figure is, not just for computation of the statutory maximum, but for application of the advisory guidelines, that that's the figure that's used." [30a-31a] *See United States v. Booker*, 543 U.S. 220, 244 (2005) ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"); *accord Cunningham v. California*, 549 U.S. 270, 283-84 (2007); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

The district court categorically refused, saying the law did not permit it to use the jury's determination of drug quantity to establish the advisory guideline range. "It is not strictly what the law says. It is not even what the law says, *even permissively*." [30a, emphasis added] Contrary to

this position, the district court was authorized "to reject and vary categorically" from the guideline based on a policy disagreement. *Spears*, 129 S. Ct. at 843-44; *see United States v. Johnson*, 553 F.3d 990, 996 (6th Cir. 2009).

The Fourth Circuit found petitioner's request was "based on a misapplication" of *Spears* and *Kimbrough*. [7a] It held those cases, and the discretion they enunciated, applied only to situations involving the 100:1 crack/powder disparity. [8a] They "do not support extending the district court's authority to vary from the Guidelines range to include the authority to change the underlying facts." [8a] This analysis misses the mark. The discretion recognized in *Spears* and *Kimbrough* has nothing to do with a district court "chang[ing] the underlying facts." Rather, it concerns the district court's authority to disagree with a guideline based on the underlying facts and impose a sentence reflecting that disagreement. In other words, the district court could "reject and vary categorically" from the guidelines with respect to relevant conduct and base it on the jury's determination of drug quantity.

When district courts relied on mandatory guidelines and imposed a sentence greater than the maximum authorized by the facts admitted in a guilty plea, they violated the Sixth Amendment right to a jury trial. *Booker*, 543 U.S. at 244-45, 259. To remedy this constitutional defect, the guidelines were deemed advisory. *Id.* Under an advisory guidelines scheme, a district court must consult the guidelines, take them into account in making a sentencing determination, and impose a sentence

that is reasonable under the circumstances. *Id.* at 264, 261. To do so, it must accurately calculate an advisory guideline range. *Gall v. United States*, 552 U.S. 38, 49-50 (2007) (the district court must "begin [the] sentencing proceedings by correctly calculating the applicable Guidelines range").

In doing so, the district court is authorized to reject and vary categorically from the guidelines and policies based on a policy disagreement with the guidelines. *Spears*, 129 S. Ct. at 843-44. *Spears* involved a challenge to a district court's sentencing calculation based on its categorical rejection of the 100:1 crack-to-powder ratio. The Eighth Circuit had held the district court did not possess this authority. *Spears* reversed, reiterating that a district court had the authority to vary from the cocaine guidelines based solely on a policy disagreement with them. *Id.* at 843; *see Kimbrough*, 552 U.S. at 89 (a categorical disagreement with and variance from the guidelines is not improper, "even in a mine-run case"). As *Spears* indicated: "the point of *Kimbrough* [was] a recognition of district courts' authority to vary from the crack cocaine Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." 129 S. Ct. at 843. Thus, courts may vary from guidelines after *Spears* and *Kimbrough* based solely on policy considerations, including disagreements with guidelines. *See Duncan v. United States*, 552 F.3d 442, 444 (6th Cir. 2009); *accord United States v. Russell*, 564 F.3d 200, 204-05 (3d Cir. 2009). Indeed, as the en banc Seventh Circuit recently observed, sentencing courts "are at liberty to reject *any*

Guideline on policy grounds." *Corner*, 598 F.3d at 415 (emphasis in original).

Corner involved a question concerning the mandatory nature of the 100:1 disparity in sentences for cocaine base versus powder cocaine. The Seventh Circuit relied not only on *Spears* and its interpretation of *Kimbrough*, but also on this Court's action in *Vasquez*. In *Vasquez*, the Solicitor General disavowed the position that a district court did not have discretion, under *Spears* and *Kimbrough*, to vary from the mandatory categorization of a Criminal History Category VI for a career offender, *see* U.S.S.G. § 4B1.1, if the district court had a policy disagreement with it. Based upon this confession of error, this Court vacated and remanded. This vacatur in *Vasquez* was a "step that, though it does not endorse the Solicitor General's views, indicates receptivity to them." *Corner*. 598 F.3d at 414; *accord Bailey*, 622 F.3d at *10-11 (relying, in part, on remand in *Vasquez* to reverse where district court that believed it was required to follow career offender guideline). Both the Seventh Circuit in *Corner* and the District of Columbia Circuit in *Bailey* indicate this remand revealed the breadth of discretion afforded district courts under *Spears* and *Kimbrough*.[2]

The Fourth Circuit's interpretation of this discretion was unduly and unjustifiably restrictive and its judgment must be vacated. This Court should vacate and remand as it did in *Vasquez*. In the alternative, it should grant certiorari to clarify

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[2] Presumably, the Solicitor General will take a position in this case consistent with the one it advanced *Vasquez*.

whether any limitations constrain a district court's discretion to vary from a guideline or sentencing provision based on a policy disagreement with it, including whether to use a jury's specific finding of drug quantity to establish the relevant conduct and to set the advisory guideline range.

II. A DISTRICT COURT CANNOT IMPOSE ON A DEFENDANT A SENTENCE IN EXCESS OF THE MAXIMUM BASED ON DRUG AMOUNTS FOR WHICH THE JURY SPECIFICALLY ACQUITTED HIM WITHOUT VIOLATING HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TRIAL BY JURY.

Whether the constitutional guarantees of due process and the right to a jury trial prohibit the use of acquitted conduct to increase a sentence remains an open question, even among the members of this Court. The lower courts have no definitive instruction on this question. The question is "of recurrent importance in hundreds of sentencing proceedings in the federal criminal system," needs "to be confronted by a reasoned course of argument," and should be answered by this Court.[3] *United States v. Watts*, 519 U.S. 148, 170 (1997) (*per curiam*) (Kennedy, J., dissenting); *accord id.* at 160-70 (Stevens, J., dissenting) ("The notion that a

[3] Justice Kennedy observed that the majority conflated uncharged and acquitted conduct without discussing the special nature of the latter. *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting). "[T]o increase a sentence based on conduct underlying a charge of which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." *Id.*

charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [our constitutional] jurisprudence").

This case presents the constitutional issue in its starkest form. One of the elements of the conspiracy charge against petitioner was the actual quantity of drugs involved. *See* 21 U.S.C. § 841(b)(1)(A) (conspiracy to distribute 50 grams or more of a substance containing cocaine base) [34a-35a] In order to convict petitioner, the jury necessarily determined the quantity of drugs involved in the conspiracy. Indeed, the district court submitted this question to the jury, and the jury gave a specific response: 13.4 grams. [32a] Thus, the jury found the quantity as an element of the offense.[4] Yet the district court determined a substantially different drug quantity–almost ten times the amount found by the jury–and imposed a dramatically enhanced sentence based on this finding. Such sentencing is "reminiscent of *Alice in Wonderland*, . . . [a]cquittal first, sentence afterwards." *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (quotations

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[4] In this way, this case is quite different from one in which a jury convicts a defendant of one crime (for example, distributing drugs) and acquits of him another contemporaneous crime (possession of a firearm by a convicted felon), where the district court then relies on an element of the acquitted charge (possession of a firearm) to enhance the sentence for the conviction. In that situation, the district court cannot know the basis on which the jury acquitted of the latter crime, i.e. the jury might have found the government's proof lacking on the element of his status as a convicted felon. Here, the district court knew precisely the basis for the acquitted conduct.

omitted). Thus, the important constitutional issue is plainly apparent and deserves definitive answer.

A. The Use Of Acquitted Conduct To Calculate The Guideline Range Deprived Petitioner Of His Right To Have A Jury Confirm Or Reject Every Accusation.

The Constitution guarantees an absolute right to trial by jury. *See* U.S. Const. Art. III, § 2, cl. 3; U.S. Const. Amend. VI. This "right was designed 'to guard against a spirit of oppression and tyranny on the part or rulers,' and" was from very early times insisted on by our ancestors . . . as the great bulwark of their civil and political liberties.'" *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873)). The Frames "knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). They "understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." *United States v. Booker*, 543 U.S. 220, 238-39 (2005) (quoting Alexander Hamilton, The Federalist No. 83, p. 499 (C. Rossiter ed. 1961)).

In this context, the Framers intended the right to jury trial as both an individual right of persons accused of crime, and a structural allocation of political power to the citizenry. Punishment was

to be derived from the jury verdict alone. *Blakely v. Washington*, 542 U.S. 296, 306 (2004). "The jury could not function as the circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 306-07 (emphasis in original).

All nine justices in *Booker* agreed that, at least as to elements of crimes of which the defendant is accused, the jury must confirm the truth of every accusation. *Booker*, 543 U.S. at 239; *id.* at 327-28 (Rehnquist, C.J., dissenting). Indeed, the Framers could not have intended to guard against governmental oppression through criminal juries with ultimate power to confirm or reject the truth of every accusation, to acquit even in the face of guilt, and to partially acquit to lessen unduly harsh punishment, only to allow an administrative agency, prosecutor and judge to then nullify the jury's acquittal. To do ignores the "[e]qually well founded . . . companion right to . . . proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000). Like other "inroads upon the sacred bulwark of the nation," the use of acquitted crimes to calculate the guideline range is "fundamentally opposite to the spirit of our constitution." *Booker*, 543 U.S. at 244 (quoting 4 Blackstone 343-44).

The Sixth Amendment guarantees a sentence that is wholly authorized by the jury's verdict. "If the jury's verdict alone does not authorize the sentence . . . the Sixth Amendment requirement is not satisfied." *Cunningham v. California*, 549 U.S.

270, 290 (2007); *see Apprendi*, 530 U.S. at 483 n.10 ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury"). *Apprendi* "ensures that the judge's authority to sentence derives wholly from the jury's verdict." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see also Jones v. United States*, 526 U.S. 227 (1999). When a court uses acquitted crimes to calculate a determinate guideline sentence, it "is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved," and "they are facts comprising different crimes, each in a different count."[5] *United States v. Pimental*, 357 F. Supp. 2d 143, 152-53 (D. Mass. 2005).

Before *Apprendi* and its progeny, and without full briefing or argument, this Court held the use of acquitted conduct to calculate the guideline range did not violate the Double Jeopardy Clause.[6] *Watts*,

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[5] When a judge uses acquitted conduct to calculate the guideline range, he necessarily finds facts beyond the elements of the offense of conviction, and "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305 n.8 (emphasis in original); *see also Cunningham*, 127 S. Ct. at 863-64 ("under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge.")

[6] The guidelines require district courts to revisit acquitted conduct at a lower standard of proof through the operation of certain commentary to U.S.S.G. § 1B1.3(a)(2) and the Commission's 1991 addition to the commentary to a policy statement asserting that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements . . . in resolving disputes regarding application of the guidelines to the facts of a case." U.S.S.G. § 6A1.3, p.s., comment (background). As a result, the

519 U.S. at 156; *see also Witte v. United States*, 515 U.S. 389 (1995). *Booker* emphasized neither case involved "any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment," noting *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument."[7] *Booker*, 543 U.S. at 240 & n.4; *see United States v. Hurn*, 496 F.3d 784, 788-89 (7th Cir. 2007) ("*Watts* acknowledged that there is some disagreement among circuit courts about whether a sentence like this one, that is based almost entirely on acquitted

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use of acquitted conduct to calculate the guideline range "rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). However, the Commission's belief is mistaken. *Booker*, 543 U.S. at 319 n.6 (Thomas, J., dissenting).

[7] The very premise of *Watts* has been rejected by the Court. In 1970, Congress codified *Williams v. New York* in 18 U.S.C. § 3577 ("[n]o limitation shall be placed on the information . . . which a court of the United States may receive and consider"), then re-codified it into 18 U.S.C. § 3661. *Watts* was premised on the notion that section 3661 and *Williams* precluded a prohibition on the use of acquitted conduct in sentencing, even to increase the guideline range, because "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." 519 U.S. at 151-52. Former Justice Stevens maintained Congress did not authorize, nor did the Constitution allow, the use of acquitted conduct under section 3661's "no limitation" rubric *except* to choose a sentence within the guideline range, the only area where the court had unfettered discretion. *Id.* at 160-62 (Stevens, J., dissenting). Justice Breyer did not believe section 3661 required the use of acquitted conduct in calculating the guideline range and suggested it be abolished. *Id.* at 159 (Breyer, J., concurring).

conduct, violates due process when the district court applies a preponderance of the evidence standard... which *Watts* did not resolve"). "The door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J. concurring). This case squarely presents the matter.

B. The Use Of Acquitted Conduct To Calculate The Guideline Range Deprived Petitioner Of His Right To Due Process Under The Fifth Amendment.

The due process guarantee of proof beyond a reasonable doubt protects against factual error whenever a potential loss of liberty is at stake, regardless of the identity of the fact-finder or whether the finding results in "conviction" of a "crime." *In re Winship*, 397 U.S. 358, 363-64, 368 (1970). Indeed, facts to which the reasonable doubt standard applies are not only those related to guilt, but also those that increase punishment. *Mullaney v. Wilbur*, 421 U.S. 684, 697-99 (1975). "Since *Winship*, we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'

This was a primary lesson of *Mullaney*."[8] *Apprendi*, 530 U.S. at 484; *see also Jones*, 526 U.S. at 240-43 & n.6; *accord Cunningham*, 549 U.S. at 281-83 (referring to independent right to proof beyond a reasonable doubt and tracing origins of recent Sixth Amendment jurisprudence to doctrinal discussions of *Winship* and *Mullaney* in *Jones*). In short, the Fifth Amendment due process right stands separate from the Sixth Amendment right to trial by jury, *Apprendi*, 530 U.S. at 476-77, and applies equally to judicial fact-finding. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (despite the absence of jury fact-finding, judge's use of reasonable doubt standard assured that accuracy was not seriously diminished). Thus, the resolution of the Sixth Amendment issue in *Booker*, which concerned the reservation of control in the people against governmental power, did not address what standard of proof a judge must use under the Fifth Amendment to find facts that expose a defendant to additional loss of liberty. *Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue").

The lack of clear authority on this question has left the courts to devise their own disparate collection of rules and procedures regarding acquitted conduct. Most federal circuit courts, for example, have extended the holding of *Watts* to nullify any challenge to use of acquitted conduct under the Fifth and Sixth Amendments. Some district courts, however, have employed a reasonable

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[8] For example, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) involved a finding that resulted in a mandatory minimum sentence, not a finding that exposed the defendant to additional punishment.

doubt standard of proof on acquitted conduct or even all sentencing facts; and some, on constitutional or other grounds, have refused to consider acquitted conduct as a basis for determining the sentence.

Unsurprisingly, lower courts have divided and expressed great consternation over the continued legitimacy of practice condoned in *Watts*. At least three district courts have held that *Watts* does not survive *Booker*'s construction of the Sixth Amendment. *United States v. Coleman*, 370 F. Supp. 2d 661, 669-73 (S.D. Ohio 2005); *United States v. Pimental*, 367 F. Supp. 2d 143, 150-53 (D. Mass. 2005); *United States v. Carvajal*, 2005 WL 476125, at *4 (S.D.N.Y. 2005).

> *Booker* substantially undermines the continued vitality of *United States v. Watts* both by its logic and by it words. It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, *Blakely v. Washington*, [542 U.S. 296, 305] (2004), and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing.
>
> . . . Sentencing today—even post-*Booker*—is still profoundly influenced by the rules, namely the Guidelines. That is what the remedy opinion admonishes; that is what the post-*Booker* case law suggests. It is, in effect, a hybrid regime—neither purely

> discretionary nor mandatory Guidelines. And that fact has certain consequences in terms of the significance of acquitted conduct, and more generally, the procedural protections at sentencing.
>
> To consider acquitted conduct trivializes "legal guilt" or "legal innocence"—which is what a jury decides—in a way that is inconsistent with the tenor of the recent case law.... [W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved.

Pimental, 367 F. Supp. 2d at 150-52 (footnote omitted; emphasis removed.) Even if *Booker* does not totally preclude sentencing courts from considering drug quantities the jury refused to find, these amounts must at least be proved beyond a reasonable doubt. *Id.* at 153-54; *accord United States v. Baldwin*, 389 F. Supp. 2d 1, 2 (D.D.C. 2005).

This case exemplifies why such an approach violates the rights to jury trial and due process. Here, the high end of petitioner's sentencing range authorized by facts found by the jury beyond a reasonable doubt was 151 months. The district court, however, imposed a 284-month sentence based on conduct the government failed to prove beyond a reasonable doubt. Thus, petitioner's sentence is almost twice the sentence he would have received if the district court had not relied on acquitted

conduct. In other words, the jury's verdicts of acquittal did not matter. Indeed, the district court specifically refused petitioner's request to rely on the jury's quantity findings. ["We're not going by what the jury came up with, that's what I just said." 31a]

The Fourth Circuit allowed petitioner's sentence to stand consistent with its prior holding that "nothing in *Booker* erodes" its past precedent allowing "[r]elevant conduct of which a defendant was acquitted [to] be taken into account in sentencing for the offense of conviction." [9a] The Fourth Circuit's decision is consistent with other Courts of Appeals that have issued similar rulings, reasoning generally that courts may continue to consider acquitted conduct because *Booker* did not overrule *Watts*. *See, e.g.*, *United States v. Mercado*, 474 F.3d 654, 656-57 (9th Cir. 2007); *United States v. Brika*, 487 F.3d 450, 459 (6th Cir. 2007); *United States v. Gobbi*, 471 F.3d 302, 313-14 (1st Cir. 2006); *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366, 371-73 (D.C. Cir. 2006); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Vaughn*, 430 F.3d 518 525-27 (2d Cir. 2005); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005); *United States v. Magallenez*, 408 F.3d 672, 683-85 (10th Cir. 2005).

The federal district courts, faced with the question day in and day out, have reached a variety of conclusions regarding the constitutionality of using acquitted conduct to calculate a sentence. Though a majority of district courts have continued to use acquitted conduct to increase sentences, several have found the practice unconstitutional, or

that it contravenes 18 U.S.C. § 3553(a). For example, the district court for the District of Massachusetts found that it made "absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury and *also* conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing." *Pimental*, 367 F. Supp. 2d at 150 (internal citation omitted); *see also United States v. Coleman*, 370 F. Supp. 2d 661, 673 (S.D. Ohio 2005) ("in sum, the jury explicitly did not authorize sentencing pursuant to fraudulent conduct, and this Court will neither marginalize that finding nor allow the government another opportunity to make a failed case."), *vacated on other grounds*, *United States v. Kaminski*, 501 F.3d 655 (6th Cir. 2007).[9]

The fact that the federal sentencing guidelines are advisory following *Booker* does not solve the constitutional problem. A sentencing court is still required to calculate a defendant's sentence under

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[9] Other district courts have declined to consider acquitted conduct as part of their sentencing discretion. The district court for the Southern District of New York did so, not explicitly because of constitutional restrictions, but out of respect for the jury's verdict, finding that the punishment was responsive to the gravamen of criminality found by the jury. *United States v. Carvajal*, No. 04-cr-222, 2005 U.S. Dist. LEXIS 3076, at *15 (S.D.N.Y. Feb. 17, 2005), *aff'd*, *United States v. Acosta*, 502 F.3d 54 (2d Cir.), *cert. denied*, 128 S. Ct. 1097 (2008). Another district court limited the consideration of facts at sentencing to those either admitted by the defendant, submitted to a jury, or found by the court beyond a reasonable doubt when a jury trial is waived, finding that although *Booker* "may not require such a procedure, it is not precluded." *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1029 (D. Neb.), *aff'd*, 158 F. App'x 754 (8th Cir. 2005).

those guidelines and the resulting sentencing range can be deemed presumptively reasonable upon appeal. *Rita v. United States*, 551 U.S. 338, 347 (2007). As petitioner's case illustrates, acquittal enhancements therefore frequently become the basis of actual, not merely hypothetical, increases in punishment.[10] The constitutional violation occurs when a district court considers acquitted conduct at sentencing just as if it considered race, religion, or protected speech. Since a court is prohibited from considering these unconstitutional factors, it should also be prohibited from considering conduct for which a jury found him legally innocent.

This case presents an especially appropriate vehicle for addressing the question presented. Although the jury convicted petitioner of conspiracy to distribute drugs, it fixed the quantity involved–an element of the crime–at 13.4 grams, thereby

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[10] In *Rita*, Justice Scalia wrote separately to explain that, under the Sentencing Guidelines, "sentences whose legality is premised on a judge's finding some fact (or combination of facts)" violate the Sixth Amendment. 551 U.S. at 371 (Scalia, J., concurring in part, concurring judgment.). Although not presented by the facts in *Rita*, Justice Scalia highlighted the situation in which "the district court imposes a sentence *within* an advisory Guideline range that has been substantially enhanced by certain judge-found facts." *Id.* at 372. In that example, the hypothetical defendant had an advisory guidelines range of 33 to 41months based on the facts found by the jury. Under the Guidelines, the district court could find additional aggravating facts that produce a higher range of 235 to 293 months. In that circumstance, the "judge-found facts" are "not merely facts that the judge finds relevant in exercising his discretion, they are the legally essential predicate for his imposition of the 293-month sentence." *Id.* Thus, in the absence of judicial fact-finding, the "293-month sentence would surely be reversed as unreasonably excessive." *Id.*

acquitting him of any larger amount. [32a] Nevertheless, the district court found the quantity to be 125.8 grams [5a], nearly ten times more than the quantity fixed by the jury. In other words, the district court found petitioner guilty, by only a preponderance of evidence, of the very conduct for which the jury acquitted him. This finding raised the sentencing range from 121 to 151 months to 235 to 293 months, and the district court imposed a sentence of 284 months–an increase of nearly fifty percent above the sentence authorized by the jury's findings.

CONCLUSION

For the reasons stated herein, Eddie Bernard Rogers respectfully requests that the judgment below be vacated and the matter remanded in light of *Vasquez v. United States*, 130 S. Ct. 1135 (2010). In the alternative, he requests that a writ of certiorari issue to allow plenary review of the important constitutional questions presented.

This the 19th day of April, 2011.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-4263

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

EDDIE BERNARD ROGERS, a/k/a Mookie,

Defendant – Appellant.

No. 09-4426

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

MELANIE DEVONE ROGERS,

Defendant – Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. N. Carlton Tilley, Jr., Senior District Judge. (1:07-cr-00208-NCT-1; 1:07-cr-00208-NCT-4)

Argued: September 22, 2010
Decided: December 17, 2010

Before NIEMEYER and DUNCAN, Circuit Judges, and Robert J. CONRAD, Jr., Chief United States District Judge for the Western District of North Carolina, sitting by designation.

Affirmed by unpublished opinion. Judge Conrad wrote the opinion, in which Judge Niemeyer and Judge Duncan joined.

ARGUED: Milton Gordon Widenhouse, Jr., RUDOLF, WIDENHOUSE & FIALKO, Chapel Hill, North Carolina; Gregory Davis, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Winston-Salem, North Carolina, for Appellants. Randall Stuart Galyon, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Louis C. Allen, Federal Public Defender, Greensboro, North Carolina, for Appellants. Anna Mills Wagoner, United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

CONRAD, Chief District Judge:

Eddie Rogers (Mr. Rogers) and his wife Melanie Rogers (Mrs. Rogers) appeal their convictions and sentences following a jury trial on one count of conspiracy to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 846 and one count of maintaining a place for the purpose of distributing crack cocaine in violation of 21 U.S.C. § 856(a)(1) and § 856(b). On appeal, they allege that 1) their sentences are unreasonable; 2) their sentences violate the Sixth Amendment; and 3) with respect to Mrs. Rogers, there is insufficient evidence to support her conviction. For the following reasons, we affirm the judgment of the district court.

I.

On May 30, 2007, the appellants were indicted for conspiring with three others to distribute 50 grams or more of crack cocaine (Count One), Mr. Rogers was indicted for two substantive counts of crack cocaine distribution (Counts Two and Three), and both were indicted for maintaining their house in Laurinburg, North Carolina for the purpose of distributing crack cocaine (Count Four). The indictment was the result of a multi-year drug investigation by North Carolina law enforcement. The appellants proceeded to a joint trial where the Government introduced testimony from undercover officers and co-conspirators, evidence seized during

several controlled purchases, and evidence seized during two searches of the appellants' residence to show that the appellants were distributing crack cocaine from their home between 2002 and 2006. Mr. Rogers testified that he only sold cocaine on one day, to one person, in 2006. Mrs. Rogers testified that she was not involved in dealing drugs.

On August 29, 2007, a jury found that the appellants were guilty of Count One and Count Four. In the jury charge, the district court included a special interrogatory for the jury to determine the drug amounts for which each defendant was individually responsible as to Count One. The jury found Mr. Rogers accountable for 13.4 grams of crack cocaine; Mrs. Rogers was found accountable for 12.6 grams. Mr. Rogers was acquitted on Counts Two and Three of the indictment, relating to two distributions of crack cocaine in the amounts of 32 grams and 63.5 grams, respectively.

After the trial, the Probation Office prepared a Presentence Report (PSR) that attributed 6.64 kilograms (6,643.75 grams) of crack cocaine to the appellants, based on the trial testimony. The appellants objected to the drug quantity in the PSR at the initial sentencing hearing on August 22, 2008, so the district court continued the hearing to give the parties time to address this issue. On February 19, 2009, the Government recalled two witnesses to testify regarding the drug quantity. The district court found that the first witness, Michael Bethea, received at least 28 grams of crack cocaine from the appellants, noting that this amount was "probably a lot less than he got, and I'm confident that he got at least that much, and I suspect much more . . . ."

Joint Appendix (J.A.) 882. The district court found that the testimony of the second witness, Preston Stubbs McPhatter, established that the appellants were responsible for another 84 grams of crack cocaine. The court added the 13.8 grams of crack cocaine that had been seized by law enforcement officers during their investigation into the conspiracy, excluding the amounts related to Counts Two and Three, and reached a total drug quantity of 125.8 grams. The court noted that this total "is a low amount I found. This is in the favor of the Defendants, make no pretense that it's not." J.A. 884.

After hearing and rejecting arguments for a variance, the district court sentenced Mr. Rogers to 284 months imprisonment, near the top of his advisory Sentencing Guidelines (Guidelines) range. Mrs. Rogers was sentenced to 151 months imprisonment, at the lowest end of her Guidelines range. This appeal followed.

II.

The appellants argue that their sentences are unreasonable on two levels: first, Mr. Rogers argues that his sentence is procedurally unreasonable based on two assignments of error, and second, both appellants argue that their sentences are substantively unreasonable because they are greater than necessary to accomplish the goals of 18 U.S.C. § 3553(a). We review a sentence for reasonableness under an abuse of discretion standard. Gall v. United States, 552 U.S. 38, 51 (2007). We start by reviewing the sentence for significant procedural error, which requires us to assess whether the

district court properly calculated the Guidelines range, considered the 18 U.S.C. § 3553(a) factors, analyzed any arguments presented by the parties, and sufficiently explained the selected sentence. See id. at 49-50; see also United States v. Lynn, 592 F.3d 572, 576 (4th Cir. 2010).

Mr. Rogers's first claim of procedural error relates to the drug quantity that the district court attributed to him at sentencing. Section 1B1.3 of the Guidelines permits district courts to take "relevant conduct" into account in determining a defendant's sentence under the Guidelines. Thus, although the jury found Mr. Rogers responsible for 13.4 grams of crack cocaine in Count One, that amount was only used to determine statutory penalties and did not preclude the district court from considering all relevant conduct in calculating the drug quantity for the purpose of setting a Guidelines range. Mr. Rogers argues, however, that the district court mistakenly thought that it lacked the authority to use the jury-determined drug quantity, which was lower. As a result of the court calculating the drug quantity, Mr. Rogers received a higher sentence than he would have if the district court used the jury-determined amount. The claim that the district court did not know that it could use the jury-determined amount is derived from the following exchange between Mr. Rogers's trial counsel and the district court:

> MR. FISCHER: . . . our position is, the logical extension of all of the language that's been in *Blakely* and *Apprendi* and all of these cases that have gotten us to where we are now, where a jury

> has to decide drug amounts, is that when the jury hears that and decides beyond a reasonable doubt in their collective wisdom what a figure is, not just for computation of the statutory maximum, but for application of the advisory guidelines, that that's the figure that's used. I understand that is not strictly what the law says.
>
> THE COURT: It is not strictly what the law says. It is not even what the law says, even permissibly . . . It's not the law.

J.A. 878 (emphasis added). Mr. Rogers isolates only the district court's statement. It is clear from the entire exchange, however, that the district court was simply rejecting the argument that it was required to use the jury-determined drug amount for advisory Guidelines computations. The court never said that it was prohibited from using that amount if it so chose; its refusal to exercise its judgment in Mr. Rogers's favor hardly constitutes procedural error.

Moreover, Mr. Rogers's claim is based on a misapplication of Spears v. United States, 129 S. Ct. 840 (2009) (per curiam) and Kimbrough v. United States, 552 U.S. 85 (2007). In Spears, the Supreme Court upheld a district court's reasoning — after it first determined the defendant's drug quantity and corresponding offense level — in recalculating the offense level based on a lower crack-to-powder ratio. Spears, 129 S. Ct. at 841, 845. In doing so, the Supreme Court clarified its holding in Kimbrough by establishing that the authority of district courts to

vary from the crack-to-powder ratio in the Guidelines is not limited to individualized, case-specific circumstances but includes categorical, policy-based rejections of that ratio. Id. at 843-44 (citing Kimbrough, 525 U.S. at 111).

Neither Spears nor Kimbrough dealt with a district court's threshold determination of drug amounts. Rather, they concerned the application of the crack-to-powder ratio in fashioning a sentence after the drug amount and the resultant Guidelines range had already been established. This is because under the Guidelines, a district court must first determine drug amounts, including relevant conduct amounts, before it can determine the applicable Guidelines range. See USSG §§ 1B1.2, 1B1.3. Only after the Guidelines range is calculated can a court decide whether it will vary on the basis of the crack-to-powder ratio, and by how much. The Supreme Court's holdings in Spears and Kimbrough do not support extending the district court's authority to vary from the Guidelines range to include the authority to change the underlying facts. Judges, like laypeople, are entitled to their own opinions but not their own facts.

Mr. Rogers's second claim of procedural unreasonableness is that the district court erred because "it is unclear" if it included conduct from Counts Two and Three, for which he was acquitted, as relevant conduct in determining the drug amount attributable to Mr. Rogers for sentencing purposes. On the contrary, it is quite clear from a plain reading of the sentencing hearing transcript that the district court did not include the 95.5 grams of crack cocaine from Counts Two and Three in calculating

the drug amount. Rather, the court combined the drug quantity established at the sentencing hearing (112 grams) with the amount of crack cocaine seized by law enforcement (13.8 grams), which excluded the drug amounts related to Counts Two and Three, to reach a total drug quantity of 125.8 grams. As such, there is no basis for claiming that acquitted conduct was taken into account.

Moreover, even if the district court had included acquitted conduct in determining the drug quantity for which Mr. Rogers was responsible, there would still be no procedural error. Under settled law, sentencing courts may consider uncharged and even acquitted conduct in determining a sentence, so long as the conduct is proven by a preponderance of the evidence. See United States v. Watts, 519 U.S. 148, 157 (1997); United States v. Jones, 31 F.3d 1304, 1316 (4th Cir. 1994). As we have previously held, United States v. Booker, 543 U.S. 220 (2005) did not change the trial court's authority to make factual findings concerning sentencing factors by a preponderance of the evidence. See United States v. Morris, 429 F.3d 65, 72 (4th Cir. 2005), cert. denied, 549 U.S. 852 (2006). The district court's finding, based on a preponderance of the evidence, that Mr. Rogers was responsible for 125.8 grams of crack cocaine was therefore appropriate.

Since the district court committed no procedural error, we next evaluate whether the sentence was substantively reasonable. Here, we take into account "the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a)."

United States v. Mendoza-Mendoza, 597 F.3d 212, 216 (4th Cir. 2010) (citing Gall, 552 U.S. at 51). A sentence within a properly determined Guidelines range is presumed to be substantively reasonable. See Mendoza-Mendoza, 597 F.3d at 216 (citing Rita v. United States, 551 U.S. 338, 351 (2007)); United States v. Abu Ali, 528 F.3d 210, 261 (4th Cir. 2008).

The appellants both contend that their sentences are substantively unreasonable because the disparity in the Guidelines's treatment of crack cocaine as opposed to powder cocaine offenses results in sentences greater than necessary to accomplish the goals of 18 U.S.C. § 3553(a).[1] The appellants highlight a statement made by a Department of Justice (DOJ) official after they were sentenced, urging Congress to eliminate the sentencing disparity between crack and powder cocaine and ask us to indulge a counterfactual conditional: if this statement had been made earlier, then the prosecutor in this case would have asked the district court to apply the Guidelines range for powder instead of crack, which would have resulted in lower sentences for both defendants.

Even if this scenario had occurred, which is pure speculation, neither the DOJ official's statement nor the recommendation by the prosecutor would have required the district court to reject the Guidelines's crack-to-powder ratio. We have

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[1] Mr. Rogers also contends that his sentence is substantively unreasonable because the district court found him responsible for a much higher drug quantity than that found by the jury. As already explained, this argument is foreclosed by the district court's clear authority to make certain factual findings at sentencing.

repeatedly rejected claims that the crack-to-powder ratio violates either the Equal Protection Clause or a defendant's due process rights. See, e.g., United States v. Perkins, 108 F.3d 512, 518, 519 (4th Cir. 1997). Moreover, while Spears permits a district court to substitute its own crack-to-powder ratio if it determines the sentencing disparity is unwarranted, it does not require courts to apply a lower ratio. See 129 S. Ct. at 843-44. Here, the district court did not determine that the sentencing disparity was unwarranted. In fact, it heard from the parties on the disparity issue, expressly recognized its authority to vary, and found that this particular case did not call for a variant sentence based on the disparity. See J.A. 897. Then, the court thoroughly discussed the relevant § 3553(a) factors that informed its decision[2] and imposed sentences that were within the Guidelines range. We thus conclude, based on a totality of the circumstances, that the sentencing court did not abuse its discretion, and the appellants have not rebutted the presumption of reasonableness that we apply to a sentence within the properly calculated Guidelines range.

The appellants next contend that their sentences violate the Sixth Amendment. They argue

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[2] This discussion included that: the court's finding of drug amounts were less than they could have been, and so its decision was "ultimately fair to the Defendants" (J.A. 897); the crack cocaine that appellants sold had "horrible," "[t]errible effects on people," and the appellants were "there for a long period of time putting that stuff out" (J.A. 924); firearms were prevalent, "laying out in the living room," even around children (J.A. 925); Mr. Rogers showed a lack of remorse; both of the Rogerses lied to the court about their activities; but a sentence that included a fine would impose an undue hardship.

that the district court used facts concerning relevant conduct drug amounts that were not found by the jury. However, they acknowledge that adverse authority precludes this claim and thus raise the issue solely for the purpose of preservation. As we have repeatedly held, this claim is meritless. See United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2008) (rejecting as "too creative for the law as it stands" the argument that sentences that depend on judge-found facts in order to survive reasonableness review violate the Sixth Amendment); United States v. Battle, 499 F.3d 315, 322 (4th Cir. 2007) (holding that the district court did not violate the Sixth Amendment by imposing a sentence based on facts not found by a jury); see also Rita, 551 U.S. at 352 (holding that the presumption of reasonableness that applies to sentences that are within the Guidelines does not violate the Sixth Amendment because "[t]his Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence").

Finally, Mrs. Rogers claims that the evidence supporting her conviction is insufficient because all of it was based on witnesses who were untruthful. Mrs. Rogers acknowledges, however, that the credibility of witnesses is not subject to appellate review and thus raises this issue only "to preserve it in the event that new evidence of the witnesses' untruthfulness comes to light." Appellant's Brief at 21.

Our review must determine whether there is substantial evidence in the record, viewed in the light most favorable to the Government, to support

the jurys finding that Mrs. Rogers is guilty beyond a reasonable doubt. See, e.g., United States v. Beidler, 110 F.3d 1064, 1067 (4th Cir. 1997). But as Mrs. Rogers concedes, "we may not 'weigh the evidence or review the credibility of the witnesses' on appellate review." United States v. Perry, 335 F.3d 316, 320 (4th Cir. 2003) (quoting United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997)). Because this claim is entirely based upon the credibility of witnesses, and no new evidence supporting this claim has come to light, it must be dismissed.

III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

[Entered: December 17, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-4263(L)
(1:07-cr-00208-NCT-1)

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

EDDIE BERNARD ROGERS, a/k/a Mookie

Defendant – Appellant

No. 09-4426
(1:07-cr-00208-NCT-4)

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

MELANIE DEVONE ROGERS

Defendant – Appellant

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[Entered: April 17, 2009]

United States District Court
Middle District of North Carolina

UNITED STATES OF AMERICA

v.

EDDIE BERNARD ROGERS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 1:07CR208-1

USM Number: 23803-057

Defendant's Attorney J. Clark Fischer

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) ___ which was accepted by the court.

☒ Was found guilty on count 1 and 4 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	Conspiracy to Distribute Cocaine Base "Crack"	12/31/2006	1
21:856(a)(1) & (b)	Maintaining Drug-Involved Premises	12/31/2006	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on counts 2 and 3.

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

February 19, 2009
Date of Imposition of Judgment

[/s/]
Signature of Judicial Officer

N. Carlton Tilley, Jr.,
Senior United States District Judge
Name & Title of Judicial Officer

4/16/2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **284 months.**

[284 months as to Count 1 and 240 months as to Count 4 to run concurrently with Count 1]

☒ The court makes the following recommendations to the Bureau of Prisons: that the defendant be housed in a Bureau of Prisons facility as close as possible to the central or middle portion of North Carolina.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at _____ am/pm on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 pm on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY _____
DEPUTY US MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years.**

[Five (5) years as to Count 1 and Three (3) years as to Count 4 to run concurrently with Count 1]

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks

that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to substance abuse testing, at anytime, as directed by the probation officer. The defendant shall cooperatively participate in a substance abuse treatment program, which may include drug testing or inpatient/residential treatment, and pay for treatment services, as directed by the probation officer. During the course of treatment, the defendant shall abstain from the use of alcoholic beverages.

The defendant shall provide any requested financial information to the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties under the Schedule of Payments sheet.

	Assessment	Fine	Restitution
Totals	**$200.00**	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

Name of of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of Payment
Totals:	$	$	

☐ Restitution amount ordered pursuant to plea agreement: $

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

** Findings for the total amount of losses are required under Chapters 109A, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 24, 1996.

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $ 200.00 due immediately

☐ not later than _____, or

☒ in accordance with ☐ C, ☐ D or, ☐ E below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below); or

C ☐ Payment in _____ (*equal, weekly, monthly, quarterly*) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (*equal, weekly, monthly, quarterly*) installments of $_____ over a

period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of $200.00 is due and payable immediately at such times and in such amounts as directed by the Federal Bureau of Prisons through the Inmate Financial Responsibility Program.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk of Court, United States District Court for the Middle District of North Carolina, P. O. Box 2708, Greensboro, NC 27402, unless otherwise directed by the court, the probation officer, or the United States Attorney. **Nothing herein shall prohibit the United States Attorney from pursuing collection of outstanding criminal monetary penalties.**

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: the firearm and controlled substance seized by the government shall be destroyed at the appropriate time.

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

[Entered: January 19, 2011]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-4263
(1:07-cr-00208-NCT-1)

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

EDDIE BERNARD ROGERS, a/k/a Mookie

Defendant – Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Duncan and Chief District Judge Conrad.

For the Court

/s/ Patricia S. Connor, Clerk

[Entered: January 19, 2011]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-4263(L)
(1:07-cr-00208-NCT-1)

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

EDDIE BERNARD ROGERS, a/k/a Mookie

Defendant – Appellant

M A N D A T E

The judgment of this Court, entered December 17, 2010, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Connor, Clerk

[Entered: February 19, 2009]

SENTENCING TRANSCRIPT

* * *

MR. FISCHER: Your Honor, I certainly understand the Court's position. I've listened very carefully to what the Court said, but as we set forward in our position paper, I want the record to make clear that our position is, the logical extension of all language that's been in *Blakely* and *Apprendi* and all of these cases that have gotten us to where we are now, where a jury has to decide drug amounts, is that when the jury hears that and decides beyond a reasonable doubt in their collective wisdom what a figure is, not just for computation of the statutory maximum, but for application of the advisory guidelines, that that's the figure that's used. I understand that is not strictly what the law says.

THE COURT: It is not strictly what the law says. It is not even what the law says, even permissively. I understand you may argue that, but that's not the rule of any circuit. It's not the rule of the Supreme Court. It's not the law.

MR. FISCHER: I understand, Your Honor.

THE COURT: You can preserve your argument. There is no need to go further. That's just not the law.

MR. FISCHER: Yes, sir. Recognizing the Court's question: Well, how much do we use? I do

think we have to at least consider, as we decide independently by a preponderance of the evidence, that the jury heard it as well as we did. The jury heard Eddie Rogers testify that this was a small time operation over some period of time.

THE COURT: No. He said I only got it from his --

MR. FISCHER: I think that small time was his specific language. The jury heard all of these other witnesses. The jury looked at the lab reports, considered the buy evidence that was there and came up with a figure.

THE COURT: We're not going by what the jury came up with, that's what I just said.

MR. FISCHER: I understand.

* * *

[Entered: August 29, 2007]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA

v. 1:007cCR208-1

EDDIE BERNARD ROGERS

VERDICT

We, the jury, find the Defendant Eddie Bernard Rogers:

Guilty
Guilty or Not Guilty
on the offense charged in Count One of the Indictment.

If you find that it has been proven beyond a reasonable doubt that Mr. Rogers did knowingly and wilfully agree with another person to distribute cocaine base or "crack", please answer in what amount: 13.4 grams

Not Guilty
Guilty or Not Guilty
of the offense charged in Count Two of the Indictment.

If you find that if has been proven beyond a reasonable doubt that Mr. Rogers did knowingly and

wilfully distribute cocaine base or "crack" with the intent to distribute, please answer in what amount:

~~32~~ grams

N.C.T.

Not Guilty

Guilty or Not Guilty

of the offense charged in Count Three of the Indictment.

If you find that it has been proven beyond a reasonable doubt that Mr. Rogers did knowingly and wilfully distribute cocaine base or "crack", please answer in what amount: ~~63.5~~ grams

N.C.T.

Guilty

Guilty or Not Guilty

of the offense charged in Count Four of the Indictment.

This the 29 day of August 2007.

/s/

Foreperson

[Entered: May 30, 2007]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

UNITED STATES OF AMERICA

v.

EDDIE BERNARD ROGERS,
also known as "Mookie"
DARRYL DAVON LAW,
also known as "Jersey,"
"Jersey Mike," and Dave
TRACY ELAINE COVINGTON BETHEA,
also known as Tracy Elaine Covington Simmons
MELANIE DEVONE ROGERS

1:007CR208-1
1:007CR208-2
1:007CR208-3
1:007CR208-4

The Grand Jury charges:

COUNT ONE

From in or about 2002, up to and including 2006, the exact dates to the Grand Jurors unknown, in the County of Scotland, in the Middle District of North Carolina, and elsewhere, EDDIE BERNARD ROGERS, also known as "Mookie" DARRYL DAVON

LAW, also known as "Jersey," "Jersey Mike," and Dave, TRACY ELAINE COVINGTON BETHEA, also known as Tracy Elaine Covington Simmons MELANIE DEVONE ROGERS, and divers other persons, known and unknown to the Grand Jurors, knowingly and intentionally did unlawfully conspire, combine, confederate and agree together and with each other to commit offenses against the laws of the United States, that is:

To knowingly, intentionally and unlawfully conspire to distribute 50 grams or more of a mixture and substance containing a detectable amount of cocaine base ("crack"), a Schedule II, controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A).

COUNT TWO

On or about March 1, 2005, in the County of Scotland, in the Middle District of North Carolina, EDDIE BERNARD ROGERS, also known as "Mookie" DARRYL DAVON LAW, also known as "Jersey," "Jersey Mike," and Dave TRACY ELAINE COVINGTON BETHEA, also known as Tracy Elaine Covington Simmons, willfully, knowingly and intentionally did unlawfully distribute 32 grams (net weight) of a mixture and substance containing a detectable amount of cocaine base ("crack"), a Schedule II, controlled substance within the meaning of Title 21, United States Code, Section

812, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(B).

COUNT THREE

On or about March 4, 2005, in the County of Scotland, in the Middle District of North Carolina, EDDIE BERNARD ROGERS, also known as "Mookie" DARRYL DAVON LAW, also known as "Jersey," "Jersey Mike," and Dave TRACY ELAINE COVINGTON BETHEA, also known as Tracy Elaine Covington Simmons, willfully, knowingly and intentionally did unlawfully distribute 63.5 grams (net weight) of a mixture and substance containing a detectable amount of cocaine base ("crack"), a Schedule II, controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A).

COUNT FOUR

From in or about 2002, until on or about 2006, the exact dates to the Grand Jurors unknown, in the County of Scotland, in the Middle District of North Carolina, EDDIE BERNARD ROGERS, also known as "Mookie," and MELANIE DEVONE ROGERS knowingly and intentionally leased, rented, used and maintained a place, that is, a premises located at 10821 Barns Bridge Road, Laurinburg, North Carolina, permanently and temporarily, for the purpose of distributing a controlled substance, that is, cocaine base ("crack"), a Schedule II, controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Sections 856(a)(1) and (b).

A TRUE BILL:

_____
FOREPERSON

/s/
SANDRA J. HAIRSTON
ASSISTANT UNITED STATES ATTORNEY

/s/
ANNA MILLS WAGONER
UNITED STATES ATTORNEY